U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

(202) 565-5330
(202) 565-5325 (FAX)
www.oalj.dol.gov

Date Issued: **June 1, 2000**

Case No.: **2000-INA-55**

In the Matter of:

ELITE CUISINE
Employer,

on behalf of:

TERESA HENRIQUEZ
Alien.

Appearance: Frank E. Ronzio, Esq.
for Employer and Alien

Certifying Officer: Rebecca Marsh Day
San Francisco, CA

Before: Burke, Vittone and Wood
Administrative Law Judges

DECISION AND ORDER

Per Curiam. This case arises from the employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is

to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

This decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On July 5, 1995, Elite Cuisine ("Employer") filed an application for alien labor certification to enable Teresa Henriquez ("Alien") to fill the position of Cook. (AF 77). The job duties for the position are: "[w]ill be required to cook, season and prepare a variety of dishes including stuffed cabbage, Eggplant Melino, Schnitzel, Chicken Picata, Spaghetti Bolognaise, fried rice according to prescribed cooking recipies." *Id.* Other special requirements include: "[a]pplicant should be familiar with preparation of meat according to Hebrew Kosher ordinances, meaning prepared pure, clean and undefiled." *Id*.

On September 16, 1998, the CO issued a Notice of Findings ("NOF") proposing to deny certification. (AF 72-75). The CO found Employer to be in violation of §§ 656.3, 656.21(b)(6). (AF 73). The CO noted that because Job Service records indicated that Employer stopped reporting employment taxes one and a half years ago, it was uncertain whether Employer could provide permanent, full-time employment. *Id.* The CO noted further that a qualified U.S. worker appeared to have been rejected for other than valid, job-related reasons. *Id.* Employer was directed to take the following corrective actions in order to rebut the CO's findings:

> (1) Submit documentation demonstrating an ability to provide permanent, full-time employment to a U.S. worker at the terms and conditions stated on the ETA750A, and include a copy of a business license, and state and federal business income and tax returns; (2) explain with specificity, the lawful job-related reasons for not hiring each U.S. worker referred, and give the job title of the person who considered them for employment; and (3) provide details of attempted contact with a U.S. applicant.

Id.

Employer's rebuttal, submitted through counsel, was dated October 20, 1998. (AF 10-71). Employer contended that it is capable of providing permanent full-time employment and submitted the Alien's W-2's for 1995 and 1996 in support of its contention. *Id.* Employer argued that its rejection of a U.S. applicant was not for other than lawful reasons as the applicant had "shaky hands," which would present a safety problem. *Id.* Lastly, Employer asserted that sending a certified letter to the U.S. applicant was sufficient to demonstrate a good faith recruitment effort. *Id.*

The CO issued a Final Determination ("FD") denying certification on June 9, 1999. (AF 5-6). The CO found that Employer's rebuttal failed to satisfactorily rebut the NOF. The CO indicated that Employer failed to submit the requested documentation necessary to demonstrate its ability to provide permanent, full-time employment. *Id.*

Employer has requested a review of the denial and the record has been submitted to the Board of Alien Labor Certification Appeals ("Board") for such purpose.

DISCUSSION

An application for labor certification must clearly show that the employer has enough funds available to pay the wage or salary offered to the alien. 20 C.F.R. §§ 656.20(c)(1). Implicit in offering full time employment is the ability to pay full time wages. *See Alva Lefevre*, 1997-INA-490 (Mar. 11, 1998). Accordingly, certification may be denied if an employer fails to meet its burden of proving the sufficiency of funds to pay the alien's salary.

If the CO requests a document which has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the employer must produce it. *See Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). Here, the CO specifically requested Employer's state and federal income and business tax returns to determine whether Employer was capable of providing permanent, full-time employment. This documentation was critical to the determination of the labor certification application. On rebuttal, Employer submitted copies of the Alien's W-2 forms and his income tax returns for 1995 and 1996, not that of the business, alleging that ownership of the restaurant had changed recently. (AF 11). However, Employer failed indicate why this would prevent it from submitting its tax returns. Employer's failure to comply with the CO's reasonable request for information regarding ability to pay constitutes a ground for the denial of certification. *See The Whistlers*, 1990-INA-569 (Jan. 31, 1992). Further, the evidence submitted by Employer, which consisted of the Alien's W-2 forms and income tax returns, is not sufficient to establish that it is able to pay the advertised wage. *See AZ Air Conditioning & Heating, Inc.*, 1993-INA-554 (Mar. 31, 1995).

Because Employer has failed to demonstrate its ability to pay the wages being offered, we find, based upon the information properly submitted to the CO, that the denial of labor certification was proper. Accordingly, the following Order shall enter.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

SO ORDERED.

Entered at the direction of the panel:

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TODD R. SMYTH
Secretary to the Board of
Alien Labor Certification Appeals

TRS/jg/ktn

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decision, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition, the Board may order briefs.